

Court dismisses solicitor's negligence claim for plaintiff's failure to serve claim for nearly 7 years (*Cayer v. Arseneau*)

Delay | Litigation | Litigation & Dispute Resolution | Rules of Civil Procedure

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Issuing a Statement of Claim is the first step for a plaintiff to bring a legal claim. It is not the only step. Once issued, a plaintiff must then serve the claim on the defendant(s) within 6 months. This will alert the defendant(s) about the action, and allow them to prepare a defence and gather evidence. A plaintiff's delay in serving a claim may prejudice a defendant's ability to properly defend the action, and the action may be dismissed.

This was the result in *Cayer v. Arseneau*, 2024 ONSC 4453. The plaintiff never served the claim she commenced in 2017 and, 7 years later, brought a motion to extend the time to serve her claim and to set the matter down for trial. The court dismissed her motion due to her "extreme" delay and her failure to adequately explain the delay. Of note, the plaintiff did not tender her own evidence, but rather relied on an affidavit sworn by a paralegal at her lawyer's office. Accordingly, there was no personal evidence from the plaintiff before the court.

The plaintiff's action was a solicitor's negligence claim against her past lawyer for his representation in an insurance claim commenced in 2005, nearly 20 years prior. While various steps were taken to progress the insurance claim, the court administratively dismissed it in 2008. Neither the plaintiff nor the past lawyer knew about the dismissal.

In 2015, the lawyer passed away. Soon after, it was discovered that the underlying claim had been dismissed. The plaintiff was advised to seek legal advice. In 2017, she commenced the present solicitor's negligence claim. Although her new lawyer at the time advised her that the claim was "sent out for service", the claim was never served. That lawyer was then subsequently disbarred, and the defendant only became aware of the claim in 2023 when the plaintiff's current counsel served a notice of change of lawyer.

The defendant law firm's counsel noted that the claim had never been served and inquired with the plaintiff's counsel as to whether the plaintiff intended on pursuing her claim. For over 8 months, the plaintiff and her counsel did not respond.

In March of 2024, the Ministry of Attorney General reinstated administrative dismissals, prompting the plaintiff to then move to extend both the time for service of her 2017 claim and to set the matter down for trial.

The service of a statement of claim is governed by Rule 14.08 of the *Rules of Civil Procedure*, which states that a claim must be served within 6 months of being issued.

Under Rule 3.02, a court may extend or abridge any deadline set out in the *Rules*. To obtain an extension of time to serve a claim, a plaintiff must prove that the defendant would not be prejudiced by the extension. As well, the court will consider factors such as:

- a. The length of the plaintiff's delay,
- b. The explanation of the delay,

- c. Whether the plaintiff promptly moved for an extension,
- d. The extent to which the defendant bears responsibility for delay,
- e. Whether it was reasonable for the defendant to infer that the plaintiff was not going to bring a claim against it,
- f. The applicable limitation period,
- g. Whether the defendant had notice of the claim before the expiry of the limitation period, and
- h. Whether the defendant would suffer prejudice if the extension was granted (*Tookenay v. O'Mahony Estate*, 2024 ONSC 709 at para. 32).

In *Cayer*, the court found that almost all of the above factors favoured dismissing the plaintiff's motion.

Firstly, the plaintiff had never served her claim, which was commenced in December 2017. The paralegal's affidavit failed to explain the plaintiff's delay for various periods of time between 2017 and 2024, and what specific steps the plaintiff took to attempt to advance her claim in that time period.

The court also found that the plaintiff failed to move promptly for an extension of time. In 2023, the plaintiff's current counsel discovered that the claim had never been served, but failed to immediately bring a motion to extend the time for service. Counsel even ignored the defendant's repeated correspondence which included inquiring into whether the claim had been abandoned. The failure to respond was not explained in the paralegal's affidavit. Instead, the plaintiff waited until the Ministry reinstated administrative dismissals to bring her motion.

Further, there was no evidence that the defendant was responsible for any delay, as the firm was not even aware of the claim until 2023. From the defendant's perspective, it had advised the plaintiff to seek legal advice in 2015 and then never heard from the plaintiff again. Given the passage of seven years, the court found that it was reasonable for the defendant to assume that no claim against it would be forthcoming.

Most importantly, the court found that the defendant would suffer both actual and presumed prejudice if the plaintiff's motion to extend time for service was granted. In terms of actual prejudice, the court accepted that relevant documents and evidence were likely not preserved, and that the memories of available witnesses (if any) were likely significantly impacted by the delay. The plaintiff did not tender evidence to convince the court otherwise.

The court concluded that the plaintiff's delay was "so excessive and unexplained" that it would bring the administration of justice into disrepute if it were to allow an extension of time to serve the claim.

The court also found that the time to set the matter down for trial should not be extended.

Rule 48.14 states that if a claim is not set down for trial within 5 years of being commenced, it shall be dismissed for delay. In order to avoid this administrative dismissal, the plaintiff bears the onus of proving that there is an acceptable explanation for delay and that, if the action was allowed to proceed, the defendant would not suffer any non-compensable prejudice.

The court used its earlier findings that the plaintiff's delay was excessive and unexplained to determine that the action should not be allowed to proceed. The court noted that after September 2020, the courts re-opened from the pandemic and there were no impediments to the plaintiff moving her claim forward. This was not a case where some steps had been taken but due to some unforeseen event, the claim was not set down. In this matter, there was *no* evidence that the plaintiff took *any* steps once the claim was issued.

Additionally, the court found that there would be non-compensable prejudice to the defendant if the action continued. There had been no exchange of documents, no examinations for discovery, and no steps to retain expert evidence. It would likely be a number of years before the matter was ready for trial. The court found that it simply would not be just to extend the time to set the matter down for trial and, accordingly, the plaintiff's claim was dismissed, with costs in the amount of \$14,000 (2024 ONSC 5471). While the plaintiff argued that she should not pay any costs on the ground that she was of modest means and was unjustly caught in a fight to access justice which was frustrated by the negligence of the defendant law firm, the court found that the plaintiff had failed to tender any evidence of impecuniosity, and that the negligence of the defendant law firm could not be taken into consideration because it had not been proven.

This decision highlights the importance of moving promptly to serve a claim within the 6-month period prescribed in the *Rules*. If a plaintiff fails to do so, whether due to inadvertence or otherwise, the plaintiff must then move promptly for an extension of time to serve the claim. The longer the delay, the more prejudice that may arise and impact the defendant's rights and ability to properly defend the claim. When bringing a claim for an extension of time, a plaintiff should adduce first-hand evidence that comprehensively explains the delay, the reasons for delay, and any steps taken to reduce the potential prejudice caused by the delay.

It is also important to preserve witness evidence from the outset to negate prejudice that may arise from the passage of time and fading of memories.



A final takeaway is to communicate repeatedly with non-responsive counsel that you do not consent to the delay, thereby creating a written record that can be put before the court when a motion is brought to extend the time for service.

Representation by Gardiner Roberts LLP

The defendant law firm was represented by Lauren Rakowski and Abigail Korbin of Gardiner Roberts' Dispute Resolution Group. Ms. Rakowski is a partner with the firm and Ms. Korbin is an associate. Ms. Rakowski and Ms. Korbin were assisted in the preparation of their written materials by Isabel Yoo, an associate research lawyer. A PDF version is available to download [here](#).

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